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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS MARTIN,

Defendant and Appellant.

B207123

(Los Angeles County
Super. Ct. No. KA078144)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Bruce F. Marrs, Judge. Affirmed.

Diana L. Weiss; and Cindy A. Diamond, under appointment by the Court of
Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant
Attorney General, Sarah J. Farhat and Nima Razfar, Deputy Attorneys General, for
Plaintiff and Respondent.

A jury convicted defendant Jose Luis Martin of three counts of robbery (Pen. Code, § 211),¹ and found true in each count that he personally used a firearm (§ 12022.53, subd. (b)). The jury also convicted him of possession of a firearm by a person previously convicted of robbery (§ 12021.1, subds. (a) & (b)(18)) and possession of ammunition (§ 12316, subd. (b)(1)). The jury found that he had suffered a prior conviction under the Three Strikes law (§§ 1170.12, subds. (a) – (d), 667, subds. (b) – (i)), that he had suffered a prior serious felony conviction (§ 667, subd. (a)(1)), and that he had served a prior prison term (§ 667.5, subd. (b)). The trial court sentenced him to 33 years in state prison.

Defendant appeals from the judgment of conviction, contending that his trial attorney was ineffective for not moving to suppress, on *Miranda* and involuntariness grounds, statements he made under police interrogation. He also contends that section 654 bars separate punishment for, on the one hand, possessing a firearm and ammunition, and, on the other hand, the firearm use enhancements on the robberies. We affirm.

EVIDENCE

Prosecution

Defendant's three robbery convictions arose from two separate incidents. The first occurred on February 11, 2007, at a 7-Eleven Store in Covina. Around 3:00 a.m. a man approached the clerk, Rashdal Singh, pointed a gun at him, and said, "Give me all your money or I'll shoot you." Singh gave the man about \$300.

Singh did not testify at trial. Rather, a security videotape, authenticated by the store manager, Baldev Singh, was played for the jury. Also Baldev Singh and

¹ All undesignated section references are to the Penal Code.

Covina Police Officer Oswaldo Preciado testified to victim Rashdal Singh's version of the robbery. According to Officer Preciado, Rashdal Singh described the robber as having worn black gloves with white writing that said "mechanic." No witness identified defendant as the robber.

The second robbery incident occurred two days later, on February 13, 2007, at a Long's Drug Store in West Covina. Around 9:00 p.m., a man with a bandana covering his face, wearing a hooded blue sweater and black gloves, entered the store. He went behind a cashier, Aurora Montano, pointed a handgun, and told her to "open the fucking register." Montano, who was ringing up a customer, finished the transaction, opened the register, and moved away. The store manager, Steven Macias, approached, but the man told him to step back. The man took about \$600 from the register, along with some customer checks. He fled from the store, dropping \$115 when he jumped over a wall; the police later recovered the cash. Montano and Macias were unable to identify the robber because his face was concealed.

On February 14, 2007, about six hours after the Long's Drug Store robbery, Covina Police Detectives Terrence Hanou and Daniel Regan conducted a parole search at a residence where parolee James Foster lived. Foster then was in custody in connection with a robbery committed the day before (not one of the robberies involved in the instant case). Defendant, who was not a target of the search, also lived at the residence. He was present (along with two other men) when the search occurred.

Defendant told Detective Regan that he was in the process of moving into the residence and that some of his belongings were in the front, southern-most bedroom. In that bedroom, Detective Hanou recovered a pair of black gloves, two handguns (one a .38 caliber, the other a .22 caliber), both of which were loaded,

and a dark grey ski mask with eye holes cut out. In the closet of the bedroom, he found a black leather jacket that contained a wallet which held defendant's California Identification Card and social security card, 11 checks made out to Long's Drug Store, and more than \$500 in cash. In a drawer of the same dresser on which he found the firearms, Detective Hanou found "a box of a variety of pistol ammunition and rifle ammunition, all center-fire cartridges." Defendant was arrested on an outstanding parole hold.

That day, defendant was interviewed by West Covina Detective Doug Murray at the Covina Police Department. Also present during the interview were Detective Murray's partner, Detective Love, and Covina Detective Regan. In the interview, defendant confessed to the 7-Eleven and Long's Drug Store robberies. (We summarize the contents of defendant's statements, below, in discussing his claim of ineffective assistance of counsel). A tape recording of the interview was played for the jury and a transcript provided.

Defense

Sandra Miranda, who was present when the Long's Drug Store robbery occurred, testified that defendant did not appear to fit the physical description of the robber.

Judy Sandoval, a family friend of defendant, testified that on February 13, 2007, between 8:00 p.m. and 10:00 p.m., she had about four telephone conversations with defendant about his moving out of his parents' home. (The Long's Drug Store robbery occurred around 9:00 p.m.)

Sara Arteche, who lived with her family at the house that was the subject of the parole search, testified that defendant had barely moved into the residence, and that his belongings were in several rooms. Defendant's wallet was reddish brown,

not black like the one found by the police in defendant's jacket. Arteche testified that on February 13, defendant was with her at the residence from 8:00 p.m. until around 10:00 p.m., when James Foster returned, and Arteche and defendant then left for the home of defendant's parents.

Defendant testified that while in jail at the Covina Police Department before being interrogated, James Foster was a few cells away. Foster threatened that if defendant did not take the fall for the robberies, defendant's family would be hurt. Defendant confessed to the robberies out of fear for his family. He took Foster's threat seriously, because he knew that Foster was a white supremacist with a prison history. Defendant knew the details of the crimes because he had heard Foster talk about them. Defendant denied that the guns, mask, and wallet recovered by the police were his. Defendant admitted that the identification card and other items in the wallet were his, and that the jacket in which the wallet was found was his. But he did not know how those items came to be where they were, and he assumed Foster planted them.

DISCUSSION

I. Ineffective Assistance of Counsel

In an interrogation at the Covina Police Department on February 14, 2007, defendant confessed to the 7-Eleven and Long's Drug Store robberies. Defendant's trial counsel moved to exclude defendant's statements under Evidence Code section 352 and the corpus delicti rule, but not on any other grounds. The motions were denied.

On appeal, defendant contends that his trial counsel was ineffective for not moving to suppress his statements on *Miranda* grounds, or on the ground that his statements were involuntary. Although his appellate briefing is not entirely clear,

defendant appears to identify three alleged *Miranda* violations on which trial counsel should have sought to suppress his statements. First, defendant contends that the *Miranda* advisement was defective because the police assured him that his statements would be “confidential,” thus contradicting the notion that his statements might be used against him. Second, defendant asserts that any implied waiver of his *Miranda* rights was not knowing and voluntary because the representation that his statements would be “confidential” (that is, would not be used against him) was false. Third, defendant argues that a “re-invocation” of his right to remain silent occurred when he questioned the police as to why he was being tape recorded. Defendant also contends that his trial counsel should have argued that his statements were involuntary, because he was induced to speak by two false promises: the promise of confidentiality, and the promise that the detectives would come back to see him after the interview.

None of the grounds identified by defendant to suppress his statements were viable. Therefore, he cannot prove his claim of ineffective assistance of counsel, because he suffered no prejudice from counsel’s alleged failings.

A. *Background*

Defendant was interviewed by West Covina Police Detective Doug Murray. Also present during the interview were Detective Murray’s partner, Detective Love, and Covina Detective Regan.²

² Although Detective Murray led the interview, occasionally more than one detective spoke. However, the transcript of the interview does not distinguish among the three detectives. For sake of simplicity, we will refer only to Detective Murray, with the understanding that on occasion one of the other two detectives might have been the actual speaker.

After a brief greeting, Detective Murray began by advising defendant of his *Miranda* rights: “Okay, ‘cause you’re here, I gotta give you your rights. You have the right to remain silent. If you give up the right to remain silent, anything you say may be used against you in court. You have the right to speak with an attorney and have the attorney present during questioning. If you so desire, but cannot afford one, an attorney will be appointed for you, without charge, before questioning. Do you understand each of these rights I’ve explained to you?” Defendant affirmed that he understood.

Detective Murray then introduced himself and the other two detectives, and informed defendant that he was there because “[t]here was an armed robbery that took place last night at the Long’s store on Glendora Avenue, West Covina.” Defendant denied knowing that location. After a brief discussion about where defendant lived and about an incident in which defendant had an argument with a clerk at a 7-Eleven store, Detective Murray told defendant, in substance, that he knew defendant had committed the robbery because two witnesses had identified him from the surveillance video (which was not true), and that he was giving defendant a chance to tell his side of the story. He said, in relevant part: “Here’s the deal. Uhm – I’ll be as up front as I can with you, ‘cause I don’t – I don’t enjoy being bullshitted, and I’m sure that you would appreciate just – . . . me being straight honest with you. I know you’re responsible for the robbery, and that’s what you’re gonna be charged with, so we’re here to find out your side of it so that we can understand what happened – uh – because there’s no getting out of this. There’s a video tape of the event, and you’ve been identified by two of the people, that were in the store, as being the person who did the robbery. So, with that said, I think it’s important that the courts [hear] your side of this, so they can understand

and make an informed decision on what they're gonna do with you, rather than just hammering you. Okay?"

The detective also expressed sympathy for defendant's situation, and mentioned presenting that situation to the district attorney. He said: "I think . . . what is going on, here, is, you're probably having some difficulty with, either getting a steady job, or having, you know, a regular source of money coming in, and you made a decision that you wouldn'ta normally made, but got desperate and did something you wouldn't've normally done. If that's the case, I need to know that, so I can explain that to the d. a. that's gonna be handling this case, okay? You seem like a pretty nice guy. You don't strike me as the kind of guy that we – we're used to dealing with. We're – we deal with some pretty hard, cold dudes and, you know, quite honestly, you – you don't seem to fit that mold. And I'm kinda curious, what's happened with you that's made you make some of these decisions, 'cause, you know, maybe it's some things – some errors – that we can correct, maybe turn some things around, get you some help. I mean, if you got a substance problem, or something else going on, maybe we can work with your agent to get some – some things going for you that can get you back on the right track. But the decision that got made, yesterday, it was just wrong, and you can't be doing shit like that, dude. So how come that happened?"

Defendant responded that he "didn't do nothing." Detective Murray then warned defendant that DNA evidence might link him to the crimes (in truth, no DNA testing was contemplated), and that upon hearing that evidence the jury would "hammer you, dude. They're not gonna see you as a human being. . . . They're gonna see you as somebody that they can't deal with."

Defendant then asked, "What . . . can you promise me? . . . What options do I got?" Detective Murray replied: "If you know about something that's bigger

and badder than what you done, you know, we're all ears. That's an option." He also said that "the fortunate thing, here, is nobody got hurt," and only "[a] little bit of money got taken," so "[w]e can deal with that. We can work with that."

Detective Murray posited that defendant committed the robbery out of desperation ("it got to a point where . . . either [you] do something that [you] don't want to do . . . or [you] don't eat").

Defendant then asked, "So . . . what do you mean, if I know some things bigger and badder?" The detective explained that "sometimes, if people have information on a – on a pending investigation that's – that's prominent, you know, often . . . the district attorney will consider that . . . in their decision that they make."

Defendant expressed concern about testifying: "And they won't – they won't – they're gonna want me to talk on the stand? They want me to do all this for them?" Detective Murray professed no knowledge of "how that stuff works." He added: "I only know . . . that, sometimes, I've seen people been able to work their cases off by not having to go testify, and providing critical information. That's down the road, though, okay? If that's something you want to explore, myself or one of the other guys can help you with that. That's – that's not a problem. Uhm – and, by the way, everything that we talk about in here is confidential."

Defendant responded: "[S]o, I'm saying what if – but – but if – if I – I do tell you guys something, what can you promise me?" Detective Murray made no promises: "I don't want to say, hey, I guarantee this will happen, and then have something else happen and go sideways, down the road, and you – you think that I misled you. 'cause I don't want that. I want to be completely honest with each other, okay?"

Detective Murray then asked what information defendant might have. Defendant responded, “A lot of drug . . . like.” The detective interrupted to ask whether defendant had a drug problem. Defendant admitted that he did, and Detective Murray had a brief discussion with him about his drinking and living arrangements.

Defendant interrupted to ask, “I’m being recorded right now?” When informed that he was, defendant said, “I thought you said it was confidential?” The following exchange then occurred:

“[Detective Murray]: It is confidential.

“[Defendant]: How come I’m being recorded?

“[Detective Murray]: It – it’s confidential for us. It’s just to help us with our notes.”

The other detectives added: “That’s why we brought you out of our jail,” and “Yeah, you’re not sitting in there with the other inmates, and stuff like that, okay?”

Defendant made no audible response. Detective Murray then said, “All right. Just – you gotta trust me, there.” He then mentioned having a drug-addicted family member who died and who “was doing a lot of the stupid things that you’re doing.” Defendant’s response was only partly intelligible: “I – I don’t do that stupid shit to – to – to . . . home, but I didn’t do it for.” When the detective interrupted to say, “Well, you need to survive,” defendant agreed.

After a further brief discussion concerning defendant not being a “desperate thug,” his having nonresponsive parole agents, and his need (as defendant stated) “to pay the bill,” the Detective Murray asked: “Now the – the thing that happened yesterday. Did you give any of the money . . . from that to anybody else, or did

you keep that yourself at the Long's?" Defendant replied, "Yeah, I gave it to somebody else."

Thereafter, under further questioning, defendant confessed to the Long's robbery. He said that he was driven to the store by "somebody," that in the robbery he showed the girl his gun (the clip of which he had removed) because he "was too scared to point it at anybody," that he took the money from the register, and that he fled in the car with the person who had driven him to the store.

Detective Murray then asked defendant about a "similar event . . . a few days before that . . . at the 7-Eleven, nearby." Defendant initially denied involvement, though he admitted being "around when they talked about it . . . the next day." Later, after being pressed by Detective Murray to be truthful, defendant asked, "[B]ut I mean, how are you gonna help me out, though to get out of this?" Detective Murray told defendant: "Well, I don't know that getting out of it is possible. It – like I said, we make recommendations to the d. a., based on evidence, honesty, and what we think of the person, okay? That's truthful." Defendant then offered information about a person "working with the Mexican Mafia" who said that the authorities were looking for him. Detective Murray said: "I mean, . . . I guess we're getting back to, if you're being straight about everything, just be straight about everything. Don't tell 50 percent truth and then . . . how bad is this gonna be for me? Let's make up a story. Because, then, nobody believes what you say."

Defendant replied, "I'm saying, what the hell if they give me life in prison for sh –" Detective Murray interrupted: "Jose, did you do the one at the 7-Eleven?" Defendant said, "I did, too," and explained that he did it "cause I needed \$350 . . . so I can rent the room." He then said, under questioning, that

someone drove him to the 7-Eleven, that he had a small handgun in his pocket, that he demanded money from the guy in the store, and then ran out with the money.

Defendant provided further details about both the Long's and 7-Eleven robberies, and also information tending to tie James Foster to another robbery. Defendant then asked the detectives to "help me out on this," and claimed to have been sexually abused by a family member. Detective Murray told defendant: "We're gonna go work on this for a little bit. We'll probably be back to chat with you a little bit more, okay? . . . Gotta put our heads together." Defendant then claimed that he was "fixing to get a green light on me" because he had "rip[ped] off" the Mexican Mafia when he was younger. Detective Murray said he would arrange protective status for defendant in county jail.

B. *Analysis*

Defendant's claim that his trial attorney provided ineffective assistance of counsel is defeated by the record of the interrogation. "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. Moreover, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." [Citation.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126 (*Rodrigues*); see *In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

Here, we have no need to analyze trial counsel's performance under the first prong of the ineffective assistance standard, because it is clear that defendant cannot meet the second prong. That is, defendant suffered no prejudice, because no viable grounds existed under *Miranda* to exclude his statements, and there was no basis on which to find his statements involuntary. Thus, it is not reasonably probable that in the absence of counsel's alleged failings, a different result would have been reached.

Defendant contends that the *Miranda* advisement was defective because the police assured him that his statements would be confidential, thus contradicting the notion that his statements might be used against him. A *Miranda* warning must include an advisement that, inter alia, the suspect has the right to remain silent and that any statement the suspect makes can be used against him or her in court. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444.) However, no specific "incantation" of this or any of the other advisements is required (*Duckworth v. Eagan* (1989) 492 U.S. 195, 202), and the admonition need not convey the notion that use of the suspect's statements will necessarily occur. (See *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664 [advisement that statements would be used "if we can" and "just in case we are able to use it" did not render advisement invalid]; see also *Miranda, supra*, 384 U.S. at p. 444 [statements "may be used"].)

Here, Detective Murray informed defendant: "You have the right to remain silent. If you give up the right to remain silent, anything you say may be used against you in court." Nothing said in the interview undercut this advisement. Indeed, throughout the interview Detective Murray made clear that he was seeking information to convey to the district attorney. Defendant obviously understood, because he repeatedly attempted to provide information that could be conveyed to the district attorney, and might result in leniency. The mention of confidentiality

did not occur in the context of protecting defendant against *use* of incriminating statements against *him*. It occurred in the context of defendant providing information about “things bigger and badder” than his crimes and defendant’s concern about testifying concerning that information (“And they won’t – they won’t – they’re gonna want me to talk on the stand? They want me to do all this for them?”). There is no reasonable basis on which trial defense counsel could have argued that the promise of confidentiality vitiated the earlier proper advisement that defendant had the right to remain silent and that his statements could be used against him.

Defendant next asserts that his trial defense counsel should have moved to suppress his statements on the ground that any implied waiver of his *Miranda* rights was not knowing and voluntary because the representation that his statements would be confidential was false. We disagree. A waiver of *Miranda* rights may be express or implied. (See *People v. Whitson* (1998) 17 Cal.4th 229, 247-250; *People v. Sully* (1991) 53 Cal.3d 1195, 1233 (*Sully*).) When a suspect has been advised of his rights, has affirmed his understanding of those rights, and thereafter proceeds to answer questions, he may be deemed to have impliedly waived his *Miranda* rights. (*People v. Cruz* (2008) 44 Cal.4th 636, 667 (*Cruz*); *Sully, supra*, 53 Cal.3d at p. 1233; see *People v. DeV Vaughn* (1977) 18 Cal.3d 889, 899, fn. 8.) Whether a knowing and voluntary waiver occurred depends on an examination of the totality of circumstances. (*Cruz, supra*, 44 Cal.4th at p. 668.)

Here, defendant apparently concedes that, on the face of the interrogation, he impliedly waived his *Miranda* rights by answering questions after affirming he understood his rights. His contention is that this implied waiver was invalid because it was obtained by deception – that is, by a promise of confidentiality, meaning a promise that defendant’s statements would not be used against him. But

as we have explained, defendant misconstrues the nature of the detectives' reference to confidentiality. Nothing in the record remotely suggests that the detectives promised that defendant's statements would not be used against him, or that defendant believed such a promise had been made.

Defendant further asserts that his "alarm at being recorded and his refusal to speak until the officer assured him the information . . . would be confidential should be considered a re-invocation of [his] *Miranda* rights." However, "[i]n order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must unambiguously' assert his right to silence or counsel. [Citation.] It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda, supra*, 384 U.S. 436, either to ask clarifying questions or to cease questioning altogether." (*People v. Stitely* (2005) 35 Cal.4th 514, 535.)

In the relevant exchange during defendant's interview, defendant asked if he was being recorded. When informed he was, he stated that he thought Detective Murray had "said it was confidential" and he questioned "[h]ow come [he was] being recorded." After the detectives explained that the recording was to "help [them] with [their] notes," and that defendant was "not sitting in [jail] with the other inmates" while he spoke, defendant did not again express any concern or any unwillingness to answer questions. No reasonable basis exists for an argument that this exchange manifested even an equivocal invocation of defendant's *Miranda* rights, much less an unequivocal invocation.

Finally, defendant contends that his trial counsel should have argued that his statements were involuntary, because he was induced to speak by two false

promises: the promise of confidentiality, and the promise that the detectives would come back to see him after the interview. “The test for determining whether a confession is voluntary is whether the questioned suspect’s ‘will was overborne at the time he confessed.’ [Citation.] ‘A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions.’ [Citation.]” (*Cruz, supra*, 44 Cal.4th at p. 669.) The promises identified by defendant did not render his statements involuntary. The representation of confidentiality related not to statements implicating defendant in his own crimes, but to information he might provide implicating third persons in other crimes. Thus, even assuming it was false, it had no causal relationship to defendant’s confession to the Long’s and 7-Eleven robberies. Moreover, when the promise to visit defendant was made, defendant had already confessed to the two robberies. Thus, this promise could have had no effect on the voluntariness of defendant’s statements.

In short, assuming for the sake of argument that trial defense counsel should have moved to suppress defendant’s statements on *Miranda* or involuntariness grounds, defendant suffered no prejudice, because it is not reasonably probable that the statements would have been suppressed. Thus, defendant has failed to show that his trial defense attorney was ineffective. (*Rodriguez, supra*, 8 Cal.4th at p. 1126.)

II. Section 654

On each of defendant’s convictions of possession of a firearm by a person previously convicted of robbery (§ 12021.1, subds. (a) & (b)(18)) and possession of ammunition (§ 12316, subd. (b)(1)), the trial court imposed terms of 16 months (one-third the middle term of 24 months, doubled under the Three Strikes law),

consecutive to the terms for the robbery convictions and firearm use enhancements on counts 1 and 2. Defendant contends that section 654 prohibited separate punishment for, on the one hand, his convictions of possession of a firearm and ammunition, and, on the other hand, his firearm use during the robberies. We disagree.

Under section 654, “[a] course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment. [Citation.] ‘If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.] If, on the other hand, ‘[the defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.] . . . [¶] Whether multiple convictions are part of an indivisible transaction is primarily a question of fact. [Citation.] We review such a finding under the substantial evidence test [citation]; we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

Here, substantial evidence supports a finding that defendant possessed two firearms and assorted ammunition at his place of residence when the search occurred on February 14, 2007. Those acts of possession were separate and apart from defendant’s use of a firearm (and his possession of a firearm and ammunition) during the robberies of February 11 and 13. Although it is true that the prosecutor argued at trial that the jury could convict defendant based on his possession of the items at the residence *or* based on his use of a firearm during the

robberies, the trial court was free at sentencing to make its own determination as to whether defendant had separate intents and objectives relating to the possession offenses and the firearm use enhancements. The court implicitly made such a determination by imposing consecutive sentences for the possession offenses in addition to the terms for the firearm use during the robberies. That implicit determination is supported by substantial evidence: the possession of the firearms and ammunition at the residence was clearly separate from the firearm use during the robberies, and had a separate intent and objective (e.g., firearm use in future crimes). Thus, section 654 does not prohibit multiple sentences.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.